Supreme Court, U.S.
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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Rebecca Baker, a Legally Incapacitated Person, by
William J. Baker, Jr., Guardian, and William J. Baker, Sr.,
Plaintiff/Appellants

vs.

Sears, Roebuck and Co.,
A Foreign Corporation,
Defendant/Appellee

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the United States Court of Appeals decision sanctions a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of the United States Supreme Court's power of supervision, where the Appeal Court's affirmation of the District Court granting of Defendant/Appellee's Motion for Summary Disposition of Dismissal pursuant to FRCP 56(c), in favor of Defendant Corporation and against Plaintiff/Appellant public invitee conflicts with the prior Court of Appeal standards in reviewing the propriety of Distrct Court Summary Judgments in such negligence actions, was not a de novo review, did not view all facts nor draw all inferences in favor of Plaintiff/Appellants, made improper witness credibility determinations, and improperly weighed the evidence.

PARTIES TO PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1. Rebecca Baker, a Legally Incapacitated Person, by William J. Baker, Jr., Guardian, and William J. Baker, Petitioners.

2. Sears, Roebuck and Co., A Foreign Corporation, Respondent.

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OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals which is the subject of this Petition was rendered on October 20, 1994 and is reported as ***Rebecca Baker, a Legally Incapacitated Person, by William J. Baker, Jr., Guardian, and William J. Baker v. Sears, Roebuck and Company***, United States Court of Appeals Docket No. 93-1084. The Opinion and Order was not recommended for full text publication by the Court of Appeals.

On September 18, 1992, the United States District Court for the Eastern District of Michigan, Southern Division, entered a Partial Summary Judgment Memorandum Opinion and Order of Dismissal (only as to alleged presence of water on Defendant's stairway) in Petitioners' suit, ***Rebecca Baker, et. al., v. Sears, et. al.,*** Civil Action No. 91-CV-75687-DT. On December 17, 1992 , the District Court granted the balance of Defendant's Motion for Summary Judgment and entered a Final Summary Judgment of dismissal as to all remaining claims herein of the Plaintiffs.

The opinion of the Court of Appeals for the Sixth Circuit is reprinted in the Appendix A, infra. The opinions of the United States District Court for the Eastern District of Michigan, Southern Division are reproduced in Appendix B and C, infra.

JURISDICTION

Petitioners, Rebecca Baker, a Legally Incapacitated Person, by William J. Baker, Jr., Guardian, and William J. Baker, Sr., Plaintiff/Appellants, seek review of the decision of the United States Court of Appeals for the Sixth Circuit entered on October 20, 1994. No Petition for rehearing was filed.

This action alleging various claims of negligence, as a result of personal injuries suffered by Rebecca Baker when she slipped and fell down a staircase at Defendant's store, was brought in the Wayne County Circuit Court on or about September, 1991 and subsequently properly removed by the Defendant on or about October, 1991, to the United States District Court pursuant to 28 USC Sec. 1441. Subject matter jurisdiction in the trial court is based upon diversity of citizenship under 28 USC Sec. 1332.

On September 18, 1992 (Partial Summary Judgment Memorandum Opinion and Order of dismissal only as to alleged presence of water on Defendant's stairway)) and December 17, 1992 (Final SummaryJudgment of dismissal as to all remaining claims), the District Court granted Defendant's Motion for Summary Judgment. See Appendix B and C, respectively, infra.

On October 20, 1994, the Sixth Circuit entered a decision

affirming the District Court's order granting Summary Judgment (the Dissenting Opinion of Judge Keith is notable). See Appendix A, infra. Jurisdiction in the Court of Appeals was under Title 28, United States Code, Section 1291.

Jurisdiction of the Supreme Court to review the Court of Appeals decision of the Sixth Circuit exists under 28 U.S.C. Sec. 1254(1).

STATUTES

2 Restatement Torts 2d, Section 343, relating to the legal duty owed by a premise owner to its invitees, provides:

> "A possessor of land is subject to liability for physical harm caused to his invitees a condition on the land, if, but only if, he (a) knows or in the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger."

STATEMENT OF THE CASE

This case arises from an affirmation by the Court of Appeals majority of a Summary Judgment rendered in favor of the

Defendant/Appellee, Sears, Roebuck and Company, by the District Court, which dismissed this action alleging various claims of negligence as a result of personal injuries suffered by Rebecca Baker when she slipped and fell down a staircase at Defendant's store. The Dissenting Opinion of Court of Appeals Judge Keith is notable. See Appendix A, infra.

The relevant facts are summarized in the opinion of the Court of Appeals, as follows:

> Plaintiffs Rebecca Baker ("Baker") and her husband, William J. Baker, Sr., appeal from an order of the district court granting summary judgment to defendant, Sears, Roebuck and Company, on various claims filed as a result of personal injuries suffered by Baker when she fell down a staircase at defendant's store.
>
> Within minutes of the store's opening on the morning of January 5, 1991, Baker, then forty-two years of age, and a friend, Nancy Craig, entered and travelled by escalator to the second floor in order to make a payment on Craig's account. This was accomplished quickly, and the two women decided to use the stairs to return to the first floor. The stairway consisted of two flights of stairs separated by a landing approximately midway between the floors.
>
> Craig was concerned that the stairs would be wet because it had been snowing that morning. Approaching the stairs, she noticed water on the steps and warned Baker of its presence. After advising Baker to be careful, Craig proceeded down the stairs, "one step at a time," with Baker following. The two made it down the first flight of stairs but, after beginning down the second flight, Baker fell and tumbled down the stairs past Craig, who did not see what

caused Baker to fall. She sustained a head injury and can remember nothing of the incident.

Baker filed suit against Sears in state court alleging numerous tort theories. Defendant removed the suit on diversity grounds, and moved for summary judgment. The district court concluded that Baker had pleaded three different theones of negligence: defective design of the staircase (dangerous pitch and slippery materials); negligent maintenance of the staircase (allowing water to remain); and failure to wam of defective and hazardous conditions.

"....the [District] court granted summary judgment to defendant on Baker's negligence and failure to warn claims insofar as they involved the existence of water on the staircase."

"The district court also granted summary judgment on Baker's defective design and the related failure to warn claims....".

On January 13, 1993, Plaintiff/Appellants filed a Claim of Appeal with the United States Court of Appeals, appealing the adverse December 12, 1992 District Court Final Summary Disposition Order. On October 20, 1994, the Court of Appeals issued its written ruling, affirming the District Court and from which Plaintiff/Appellants now seek relief .

THE DISTRICT COURT RULING

The District Court granted Sears' Motion for Summary Judgment, stating, as summarized in the court of appeals decision:

Defendant...moved for summary judgment. The district court concluded that Baker had pleaded three different theories of negligence: defective design of the staircase (dangerous pitch and slippery materials); negligent maintenance of the staircase (allowing water to remain); and failure to wam of defective and hazardous conditions. While defendant argued that the existence of water on the staircase was an open and obvious danger, the district court found it unnecessary to address this issue due to Baker's failure to produce any evidence that defendant had notice of the existence of water on the stairs. See *Oppenheim v. Pitcairn*, 293 Mich. 475, 292 N.W. 374 (1940) (charge of negligent failure to maintain premises in reasonably safe condition requires proof that unsafe condition was known to the one on whom the duty rested, or that the character of the danger such that reasonably prudent incumbent should have knowledge).

In its motion for summary judgment, defendant argued that there was an absence of notice, but Baker failed to respond.....Therefore, the court granted summary judgment to defendant on Baker's negligence and failure to warn claims insofar as they involved the existence of water on the staircase.

The district court also granted summary judgment on Baker's defective design and the related failure to warn claims....Since Baker could remember nothing about the fall, and Craig did not witness the fall, Baker's counsel conceded that "[t]here is no way to verify what plaintiff saw or actually slipped on." In view of this predicament, Baker's counsel sought to use the testimony of an expert witness to establish the existence of a defect in the design of the stairway, and

> then pointed to the possibility that the defect caused her fall.* Baker's counsel also attempted to avoid summary judgment by asserting that Baker's sister "will testify that [Baker] told her...that she slipped while stepping on a dry area of the step." The court...rejected this proffer of testimony....". Other than this proffer, Baker...provided no evidence to show that the alleged defect caused the fall.[3]

THE RULING OF THE COURT OF APPEALS

In reviewing the District Court decision, the Sixth Circuit majority Opinion stated:

> In its motion for summary judgment, defendant argued that there was an absence of notice, but Baker failed to respond. Indeed, the only summary judgment evidence going to notice was provided by defendant, and it supported the contention that there was no such notice.[1] Therefore, the court granted

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* Appellants' Appeal Court Brief states at page 6: "In deposition, Plaintiffs' safety expert, Walter Cygan, opined that the slope of the subject stairway did not conform to the suggested slope of 30-35 degrees and constituted an unsafe condition....Mr. Cygan also performed a friction test and concluded that the stairway surface was unreasonably slippery even when dry....".

[1] Defendant presented the deposition testimony of one of its employees that he had used the stairs ten or fifteen minutes before the accident, and inspected them about two minutes before the accident, and that at neither time did he see water on the stairs.

[3] Baker also attempted to rely on a presumption found in Michigan law, as stated in a Michigan jury instruction which permits a jury to presume that a plaintiff who has no recall of her accident was not contributorily negligent....".

summary judgment to defendant on Baker's negligence and failure to warn claims insofar as they involved the existence of water on the staircase.

The district court also granted summary judgment on Baker's defective design and the related failure to warn claims. As defendant noted, Baker's position seemed to shift here to a theory that if she did not slip on a wet step, then she must have slipped on a defectively designed dry one. Defendant maintained that Baker had failed to offer any evidence concerning how she fell and was, therefore, unable to prove that the design ofthe staircase was the proximate cause of her injuries.[2] Since Baker could remember nothing about the fall, and Craig did not witness the fall, Baker's counsel conceded that "[t]here is no way to verify what plaintiff saw or actually slipped on." In view of this predicament, Baker's counsel sought to use the testimony of an expert witness to establish the existence of a defect in the design of the stairway, and then pointed to the possibility that the defect caused her fall.

Baker's reliance upon the expert's testimony is misplaced for several reasons. First, "expert opinion based upon only hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury . . . [because] 'there must be facts in evidence to support the opinion testimony of an expert.' " *Skinner v. Square D Co.*, 445 Mich. 153, 173, 516 N.W.2d 475 (1994) (citations omitted)..

Second, while it is possible that the condition of the staircase cited by Baker's expert as being defective could have caused the fall, by the same token, there are other possibilities. For example, it is possible that Baker merely

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[2] Defendant conceded, for the purposes of this argument, the issues of duty, breach, and damages.

stumbled, or, as she previously alleged, that she slipped on water on the staircase. Courts deal in probabilities, not possibilities. A plaintiff's proof must facilitate reasonable inferences of causation' not mere speculation." *Id.* at 164. When more than one possible explanation for an accident exists, a plaintiff must present facts from which a jury could infer that one theory is more likely than not the actual cause in fact. Id.

Baker's counsel also attempted to avoid summary judgment by asserting that Baker's sister "will testify that [Baker] told her . . . that she slipped while stepping on a dry area of the step." The court properly rejected this proffer of testimony as insufficient to defeat a properly supported motion for summary judgment because it "failed to go beyond the pleadings and was mere inadmissible hearsay. Other than this proffer, Baker has provided no evidence to show that the alleged defect caused the fall.[3] Accordingly, because causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment," *Id.* at 172-73, the district court properly granted summary judgment.

The district court's orders granting summary judgment to defendant on all claims are affirmed.

In reviewing the District Court decision, the Sixth Circuit dissenting Opinion stated:

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[3] Baker also attempted to rely on a presumption found in Michigan law, as stated in a Michigan jury instruction which permits a jury to presume that a plaintiff who has no recall of her accident was not contributorily negligent....".

Damon J. Kelth, Circuit Judge, dissenting. I disagree with the majority's determination that summary judgment was properly granted on Baker's claims of defective design and failure to warn. Therefore, I respectfully dissent from tlhe Court's opinion, and write separately.

Our review of a district court's grant of summary judgment is de novo. *Patton v. Beardon*, 8 F.3d 343, 346 6th Cir. 1993). All facts must be viewed and inferences drawn in favor of the plaintiffs. *E.E.O.C.v. University of Detroit*, 904 F. 2d 331, 334 (6th Cir. 1990). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgmcnt as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The judge may not make credibility determinations or weigh the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

First, the majority and the court below improperly diverged from the summary judgment standard by failing to draw inferences in Baker's favor and discounting the weight of expert testimony. Plaintiffs may use circumstantial proof to show the requisite causal link beween a defect and an injury in Michigan products liability cases. *Mulholland v. DEC Int'l Corp.*, 432 Mich. 395, 415, 443 N.W. 2d 340, 349 (l989); *Holloway v. General Motors*, (On Rehearing) 403 Mich. 614, 618, 271 N.W.2d 779 (1978). Contrary to the majority's characterization, testimony by Craig and his expert that Baker slippcd on Sears's wet and unreasonably steep stairs is not hypothetical, but circumstantially cstablishes causation between Sears' negligence and Baker's injury sufficient to require a trial.

Second, while Baker's injuries were possibly caused by something other than Sears' negligence, this is a question of fact for the jury, not a determination for the majority or the court below on summary judgment. Baker need not positively exclude every possible cause, but must simply establish a logical sequence of cause and effect.

Mulholland, 432 Mich. at 415, 443 N.W. 2d at 349. Through the testimony of Craig and the expert witness, Baker has established a logical sequence that Sears' negligence caused her injuries. Further questions of comparative probability should be determined by the trier of fact. *Holloway*, 403 Mich. at 622, 271 N.W.2d at 781.

There exists a genuine issue of material fact as to whether Sears' negligence caused Baker's injuries. The plaintiff has introduced evidence that Baker slipped on wet, defectively designed stairs. Examining the facts, and drawing all inferences in favor of Baker, I am unable to state that Sears is entitled to judgment as a matter of law. By weighing comparative probability and dismissing Baker's claim, the majority improperly userps the power of the jury and unfairly deprives Baker of access to our judicial system.

Accordingly, I would reverse the summary judgment determination of the district court and grant Plaintiffs a trial.

REASONS FOR GRANTING THE WRIT

This case presents important issues regarding the radical departure of the District Court and court of appeals in this particular negligence matter, in applying and sanctioning, respectively, summary judgment and/or review standards to the parties in this particular case, which standards are "not the norm". Absent a reversal by this Honorable Court, the case sets a dangerous summary disposition and/or review standard which conflicts with respected and logical law and practice at the original situs:

WHETHER THE UNITED STATES COURT OF APPEALS DECISION SANCTIONS A DEPARTURE BY THE LOWER (DISTRICT COURT) FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE UNITED STATES SUPREME COURT'S POWER OF SUPERVISION, WHERE THE APPEAL COURT'S AFFIRMATION OF THE DISTRICT COURT'S GRANTING OF SUMMARY DISPOSITION OF DISMISSAL PURSUANT TO FRCP 56((c) IN FAVOR OF DEFENDANT CORPORATION AND AGAINST PLAINTIFF CUSTOMER AND HER PLAINTIFF FAMILY CONFLICTS WITH THE PRIOR STANDARD SET BY THE COURT OF APPEALS AS TO THE PROPRIETY OF SUMMARY JUDGMENTS IN NEGLIGENCE ACTIONS, WAS NOT A DE NOVO REVIEW, DID NOT VIEW ALL FACTS NOR DRAW ALL INFERENCES IN FAVOR OF PLAINTIFFS, MADE CREDIBILITY DETERMINATIONS AND WEIGHED THE EVIDENCE?

FRCP 56(c) was (is) the basis for corporate Defendant Sears' Motion for summary disposition of dismissal. It clearly requires, for dismissal of the case, " pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, comma, and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there a genuine issue as to the amount of damages."

The undisputed evidence shows that (arguendo) even if the stairway were dry, and not wet (Appellants do not concede that the stairs were dry), the steep pitch and construction materials of the stairway may well have have been the proximate cause of the Plaintiff's fall. While it is possible to infer that it may not have been the proximate cause, it is also possible to infer that it may have been. In such as case, the substantive law of the situs mandates that "all facts must be viewed and inferences drawn in favor of the plaintiffs" for purposes of summary disposition. *E.E.O.C. v. University of Detroit*, 904 F. 2d 331, 334 (6th Circuit 1990).

Appellants' Appeal Court Brief states at page 6: "In deposition, Plaintiffs' safety expert, Walter Cygan, opined that the slope of the subject stairway did not conform to the suggested slope of 30-35 degrees and consituted an unsafe condition....Mr. Cygan also performed a friction test and concluded that the stairway surface was unreasonably slippery even when dry....".

However, in disposing of the Plaintiffs' record deposition proof as to the defective design of the stairway, and contrary to its own rule therefor, (*E.E.O.C.*, supra), the appeal court subjectively stated:

> Second, while it is possible that the condition of the staircase cited by Baker's expert as being defective could have caused the fall, by the same token, there are other possibilities. For example, it is possible that Baker merely stumbled, or, as she previously alleged, that she slipped on water on the staircase. Courts deal in probabilities, not possibilities. A plaintiff's proof must facilitate reasonable inferences of causation' not mere speculation." Id. at 164. When more than one possible explanation for an accident exists, a plaintiff must present facts from which a jury could infer that one theory is more likely than not the actual cause in fact. Id.

In so doing, and contrary to Anderson, supra, the appeal court determined the credibility of the expert witness and also weighed his testimony as against the possibility that Plaintiff did not fall due to the defective design or that the stairs were not defectively designed. But that function of assigning credibilty and weight of the record evidence is for the jury and is not the function of the trial judge and it is certainly not a matter of law, or the basis of FRCP 56(c).

In addition to the *Patton, E.E.O.C., Celotex, and Anderson* cases cited, supra, *Gadde v. Michigan Consolidated Gas Company*, 377 Mich. 117 (1966) also supports Plaintiff/Appellants, reflecting the majority views of the law.

As a matter of public policy, every municipality would like to have a local Sears store, and certainly as a practical matter, we

don't want to "sue them away". As a matter of law and public policy, however, individuals and the public entering their stores ought to be safe from faulty design defects such as steep and unsafe steps. A person should not have to be a top athlete to negotiate those stairs. If the lower courts want to assign weight and credibility factors, what about the Sears employee who (while still under Sears' employ) just "didn't see any snow". Is that testimony more reliable than the expert witness? Is it the function of the District Court Judge or the Court of Appeals on a de novo review to assign those factors on a 56(c) motion?

A better candidate for reversal and remand than this case cannot be found. Mrs. Baker was so severely disabled that it is a sobering experience just to watch her attempt to get up and move around. She has this, from Sears - permanently. No higher Court may want to reverse a lower court unless there is sound law and strong public policy, and a need to eradicate a dangerous precedent. Those factors exist here. Sears' has been and will do well regardless of the outcome, but in the long run must consider the public safety as a condition precedent to opening a store in a community.

Judge Keith stated it truthfully and well.

CONCLUSION

For the foregoing reasons, Petitioner Appellants respectfully pray that a Writ of Certiorari issue to review the decision of the majority of the 6th Circuit in this case.

Respectfully Submitted,

January 12, 1994

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No. 93-1084

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REBECCA BAKER, a legally incapacitated person, by WILLIAM J. BAKER, Jr., Guardian, and WILLIAM J. BAKER, SR. Plaintiffs-Appellants v. SEARS, ROEBUCK AND COMPANY, Defendant-Appellee.	NOTRECOMMENDED FOR FULL TEXT PUBLICATION Sixth Circuit Rule permits citation to specific situations. Please see Rule 24 before citing in a court in the Sixth Circuit. If cited, a copy must be served on the other parties and the Court. This notice is to be prominantly displayed if this decision is reproduced.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

OPINION

BEFORE: KEITH, NORRIS and BATCHELDER
Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Plaintiffs Rebecca Baker ("Baker") and her husband, William J. Baker, Sr., appeal from an order of the district court granting summary judgment to defendant, Sears, Roebuck and Company, on various claims filed as a result of personal injuries suffered by Baker when she fell down a staircase at defendant's store. We affirm.

Within minutes of the store's opening on the morning of January 5, 1991, Baker, then forty-two years of age, and a friend, Nancy Craig, entered and travelled by escalator to the second floor in order to make a payment on Craig's account. That was accomplished quickly, and the two women decided to use the stairs to return to the first floor. The stairway consisted of two flights of stairs separated by a landing approximately midway between the floors.

Craig was concerned that the stairs would be wet because it had been snowing that morning. Approaching

the stairs, she noticed water on the steps and warned Baker of its presence. After advising Baker to be careful, Craig proceeded down the stairs, "one step at a time", with Baker following. The two made it down the first flight of stairs but, after beginning down the second flight, Baker fell and tumbled down the stairs past Craig, who did not see what caused Baker to fall. She sustained a head injury and can remember nothing of the incident.

Baker filed suit against Sears in state court, alleging numerous tort theories. Defendant removed the suit on diversity grounds, and moved for summary judgment. The district court concluded that Baker had pleaded three different theories of negligence: defective design of the staircase (dangerous pitch and slippery materials); negligent maintenance of the staircase (allowing water to remain); and failure to warn of defective and hazardous conditions. While defendant argued that the existence of water on the staircase was an open and obvious danger, the district court found in unnecessary to address this issue due to Baker's

failure to produce any evidence that defendant had notice of the existence of water on the stairs. See Oppenheim v. Pitcairn, 293 Mich. 475, 477, 292 A-4 N.W. 374 (1940) (charge of negligent failure to maintain premises in reasonably safe condition requires proof that unsafe condition was known to the one on whom the duty rested, or that the character of the danger such [SIC] that reasonably prudent incumbent should have knowledge).

In its motion for summary judgment, defendant argued that there was an absence of notice, but Baker failed to respond. Indeed, the only summary judgment evidence going to notice was provided by defendant, and it supported the contention that there was no such notice.[1] Therefore, the court granted summary judgment to defendant on Baker's negligence and failure to warn claims insofar as they involved the existence of water on the staircase.

The district also granted summary judgment on Baker's

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[1] Defendant presented the deposition testimony of one of its employees that he had used the stairs ten or fifteen minutes before the accident, and inspected them about two minutes before the accident, and that at neither time did he see water on the stairs.

defective design and the related failure to warn claims. As Defendant noted, Baker's position seemed to shift here to a theory that if she did not slip on a wet step, then she must have slipped on a defectively designed dry one. Defendant maintained that Baker had failed to offer any evidence concerning how she fell and was, therefore, unable to prove that the design of the staircase was the proximate cause of her injuries.[2] Since Baker could remember nothing about the fall, and Craig did not witness the fall, Baker's counsel conceded that "[t]here is no way to verify what plaintiff saw or actually slipped on." In view of this predicament, Baker's counsel sought to use the testimony of an expert witness to establish the existence of a defect in the design of the stairway, and pointed to the possibility that the defect caused her fall.

Baker's reliance on the expert's testimony is misplaced for several reasons. First, "expert opinion based only upon

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[2] Defendant conceded, for the purposes of this argument, the issues of duty, breach, and damages.

hypothetical situations is not enough to demonstrate a legitimate causal connection between a defect and injury...[because] 'there must be facts in evidence to support the opinion testimony of an expert.'" Skinner v. Square D Co., 445 Mich. 153, 173, 516 N.W. 2d 475 (1994) (citations omitted.)

Second, while it is possible that the condition of the staircase cited by Baker's expert as being defective could have caused the fall, by the same token, there are other possibilities. For example, it is possible that Baker merely stumbled, or, as she previously alleged, that she slipped on water on the staircase. Courts deal in probabilities, not possibilities. A plaintiff's proof "must facilitate reasonable inferences of causation, not mere speculation." Id. at 164. When more than one possible explanation for an accident exists, a plaintiff must present facts from which a jury could infer that one theory is more likely than not the actual cause in fact. Id.

Baker's counsel also attempted to avoid summary

judgment by asserting that Baker's sister "will testify that [Baker] told her...that she slipped while stepping on a dry area of step." The court properly this proffer of testimony as insufficient to defeat a properly supported motion for summary judgment because it "failed to go beyond the pleadings," and was inadmissible hearsay. Other than this proffer, Baker has provided no evidence to show that the alleged defect caused the fall.[3] Accordingly, because "causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary judgment.

The district court's orders granting summary judgment to defendant on all claims are affirmed.

Damon J. Keith, Circuit Judge, dissenting. I disagree with the majority's determination that summary judgment was

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[3] Baker also attempted to rely upon a presumption found in Michigan Law, as stated in a Michigan jury instruction, which permits a jury to presume that a plaintiff who has no recall of her accident was not contributorily negligent. Mich. SJI 2d 10.09. However, the district court properly rejected this argument as insufficient to defeat defendant's motion. A presumption that Baker was not negligent does not tend to prove that the alleged defect was more likely than not the cause of the fall, since other causal possibilities remain.

properly granted on Baker's claims of defective design and failure to warn. Therefore, I respectfully dissent from the Court's opinion, and write separately.

Our review of a district court's grant of summary judgment is de novo. Patton v. Bearden, 8 F.3d 343. 346 (6th Cir. 1993). All facts must be viewed and inferences drawn in favor of the plaintiffs. E.E.O.C. v. University of Detroit, 904 F.2d 331,334 (6th Cir. 1990). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catret, 477 U.S. 317, 322-23 (1986). The judge may not make credibility determinations or weigh the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

First, the majority and the Court below improperly diverged from the summary judgment standard by failing to draw inferences in Baker's favor and discounting the weight of expert testimony. Plaintiffs may use circumstantial proof to show the requisite causal like between a defect and an injury

in Michigan product liability cases. Mulholland v. DED Int'l Corp., 432 Mich. 395, 415, 443 N.W. 2d 340, 349 (1989); Holloway v. General Motors, (on rehearing), 403 Mich. 614, 618, 271 N.W. 2d 777, 779 (1978). Contrary to the majority's characterization, testimony by Craig and his expert that Baker slipped on Sears' wet and unreasonably steep stairs is not hypothetical, but circumstantially establishes causation between Sears' negligence and Baker's injury sufficient to require a trial.

Second, while Baker's injuries were possibly caused by something other than Sears' negligence, this is a question of fact for the jury, not a determination for the majority or the court below on summary judgment. Baker need not positively exclude every possible cause, but must simply establish a logical sequence of cause and effect. Mulholland, 432 Mich. at 415, 443 N.W. 2d at 349. Through the testimony of Craig and the expert witness, Baker has established a logical sequence that Sears' negligence caused her injuries. Further questions of comparative probability should be determined

by the trier of fact. Holloway, 403 Mich. at 622, 443 N.W. 2d at 781.

There exists a genuine issue of material fact as to whether Sears' negligence caused Baker's injuries. The Plaintiff has introduced evidence that Baker slipped on wet, defectively designed stairs. Examining the facts, and drawing all inferences in favor of Baker, I am unable to state that Sears is entitled to judgment as a matter of law. By weighing comparative probability and dismissing Baker's claims, the majority improperly usurps the power of the jury and unfairly deprives Baker of access to our judicial system.

Accordingly, I would reverse the summary judgment of the district court, and grant Plaintiffs trial.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, a legally Incapacitated Person, by WILLIAM J. BAKER, JR., Guardian, and WILLIAM J. BAKER, SR.,

Plaintiffs,

vs.

CASE NO. 91-CV-75687-DT
HON. LAWRENCE P. ZATKOFF

SEARS, ROEBUCK AND COMPANY,

Defendant.
_____/

MEMORANDUM OPINION AND ORDER

At A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 18th day of September 1992.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

INTRODUCTION

This matter is before the Court on Defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). Plaintiff's response was untimely, however, in the interest of

justice, this Court accepted the response.[1] Defendant filed a reply brief. Pursuant to E.D. Mich. Local R. 7.1(e)(2), this Court orders that this motion be disposed of upon the briefs submitted by the parties without this Court entertaining oral arguments. For the reasons that follow, defendant's motion of summary judgment is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND

Plaintiff, Rebecca Baker, through her representatives, brought suit against defendant, Sears, Roebuck and Co., for injuries plaintiff sustained when she slipped and fell while descending a flight of stairs at defendant's Highland Park store. Plaintiff contends that as a result of her fall she has suffered a close-head injury and that she has no memory with respect to the circumstances surrounding the incident

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[1] Plaintiff also filed a document entitled "Plaintiff's response to defendant's reply to plaintiff's answer to defendant's motion for summary judgment." Plaintiff did not seek leave from this Court before filing this unauthorized document. for the purposes of this Memorandum Opinion and Order, this Court will not consider this document.

inissue.[2] Plaintiff's friend, Ms. Nancy Craig, was accompanying plaintiff at the time of the accident and is the only witness to the event.[3]

The facts in this case are not in dispute. On the morning of January 5, 1991, Ms. Craig went to have her car serviced at defendant's Highland Park store. Plaintiff offered to give Ms. Craig a ride home if Ms. Craig had to leave her car at defendant's store to be serviced. Ms. Craig arrived at the car care center of defendant's store at approximately

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[2] In her deposition, plaintiff testified as follows:
Q: Do you [plaintiff] recall falling does at Sears?
A: I can't remember.
Q: Do you recall having an accident in which you injured yourself or hurt yourself?
A: I can't remember that.
Q: Do you remember falling on any stairs?
A: I can't remember.
Q: Do you recall being at a Sears Store with your friend, Nancy Craig?
A: I can't remember.
Q: Can you recall the last time you were at a Sears store?
A: No.

Plaintiff deposition at 28.

[3] It should be noted that Ms. Craig was walking in front of plaintiff, and thus Ms. Craig was unable to see how plaintiff fell. Ms. Craig only saw plaintiff after she had fallen.

7:30 a.m.[4] Plaintiff arrived at approximately 7:50 a.m. to provide Ms. Craig transportation home.

However, Ms. Craig decided to wait at defendant's store while her car was being serviced. Plaintiff decided to wait along with her friend. While to two were waiting for Ms. Craig's car to be serviced, Ms. Craig decided to go to the second floor of the department store in order to pay her credit card bill. Soon after the department store opened for business Ms. Craig and plaintiff proceeded to the credit department located on the second floor of the department store. After paying the bill, plaintiff and Ms. Craig decided to use the stairs instead of the escalator in order to make their way back down to the car care center.

The stairway consisted of two flights of stairs divided by a landing. Plaintiff fell on the second flight of stairs, due in part to the existence of water on the stairs. Plaintiff also contends that the stairway was maintained or designed in a

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[4] The building that contains defendant's car care center is a separate building for defendant's department store building. The car care center opens for business at 7:00 a.m., while the department store opens for business at 9:30 a.m.

defective condition. Plaintiff's complaint lists the following ways in which the staircase was defective.

> a. [Defendant] Failed to properly maintain its premises in that it allowed a dangerous condition to exist in the form of a defective staircase upon which business invitees were required to walk;
>
> b. [Defendant] Carelessly and negligently permitt[ed] said staircase to remain in a slippery, dangerous and defective condition and not exercising reasonable care to correct said condition;
>
> c. Failure to take reasonable precautions to remove the slippery substance from said staircase so as to make the staircase suitable for walking thereon;
>
> d. Failed to take reasonable precautions to make the above mentioned staircase safe and suitable for walking thereon;
>
> e. Knew or should have known that the above mentioned staircase was in a defective and unsafe condition;
>
> f. That if defendant made any attempt to maintain the staircase, defendants actions were performed in such a manner so as to increase the hazard to the plaintiff herein;
>
> g. Failed to warn the plaintiff of a defective and hazardous condition of the above mentioned staircase which the defendant knew or should have known existed at the aforementioned time;
>
> h. Failure to place a covering/runner on the individual stairs in the above mentioned staircase.

A close reading of this Complaint reveals that plaintiff is proceeding on various theories of negligence. These theories include: defective design of the staircase; allowing water to remain on the steps; and failure to warn of defective condition.

As plaintiff and Ms. Craig approached the stairs, Ms. Craig testified that she was concerned that there might be water on the stairs, because earlier that morning it had started to snow. Ms. Craig also testified, in her deposition, as follows:

> Q: [C]ould you see that the stairs were wet or did you have to step on the stairs in order to know that it was wet?
> A: You have to step on it in order to see.
> * * *
> Q: Did you say to Rebecca [plaintiff]: Let's be careful on these steps, they might be slippery?
> A: That's what I said to Rebecca.
> Q: Before you started walking down the steps?
> A: Yes.
> Q: Is this before you actually got to the steps and saw water?
> A: While we were walking down. Coming down.
> Q: On the top flight of steps?
> A: Top and bottom, as you walk.
> Q: At what point did you say to her - I guess what you're saying, when you first started walking down the upper flight, that's when you said to her, these steps are wet,

they might be slippery?
A: When you walking down, you're walking down like you're going to fall on your face. That's the way the flights are made.

Ms. Craig's deposition at 15 and 64. As stated above, while plaintiff was proceeding down the second flight of stairs, she fell and sustained injuries.

II. STANDARD OF REVIEW

Defendant brought this motion for summary judgment pursuant to Fed. R. Civ. P. 56(c). Under this rule, summary judgment is appropriate only where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. A genuine issue of material fact exists when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986) (citations omitted). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the nonmoving

party. Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 2510 (1986). Where the non-moving party has failed, however, to present evidence on an essential element of their case, they have failed to meet their burden and all other factual disputes are irrelevant and thus summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986).

III. Opinion

Defendant is an owner of a premises which is held out to the public as a place of business. Under Michigan tort law plaintiff is a business invitee, that is, she "is one who enters a premises to conduct business that concerns the premises owner at the owner's express or implied invitation." Riddle v. McClouth Steel Products Corp., 440 Mich. 85, 90-91, 485 N.W.2d 676 (1992) (citations omitted). The issue of the duty of care a defendant owes a plaintiff is a threshold issue which the trial court must decide as a matter of law. Riddle, at 95

(citing Antcliff v. State Employees Credit Union, 414 Mich. 624; 327 N.W.2d 814 (1984). The Michigan Supreme Court, in Quinlivan v. Great Atlantic & Pacific Tea Co.,Inc., 395 Mich. 244, 235 N.W. 2d 732 (1975), cited with approval the following test which defines a premises owner's duty of care to invitees:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition of the land, if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

395 Mich. at 256-60 (quoting 2 Restatement Torts, 2d, § 343).

In Williams v. Cunningham Drug Stores, Inc., 429 Mich. 495, 418 N.W.2d 381 (1988), the Michigan Supreme Court discussed the affect of the invitee's knowledge of a dangerous condition on the premises owner's duty of care owed to the invitee. The Court stated that:

> A possessor of land is not liable to his invitees for physical harm caused to them by

> any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

429 Mich at 500.

Finally, in Riddle, supra, the Michigan Supreme Court held "that the 'no duty to warn of open and obvious dangers' rule remains viable in Michigan" despite the fact that Michigan has adopted the doctrine of comparative negligence. 440 Mich. at 99-100. The Riddle Court summarized the status of the law as follows:

> [T]he 'no duty to warn of open and obvious danger' rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prime facie negligence case...If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous conditions. However, where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee.

Id. at 95-96 (footnotes omitted).

Accordingly, under Michigan law, plaintiff must produce evidence to show the following elements in order to

establish a prima facia cause of action against defendant: (1) an unsafe condition existed on defendant's premises; (2) that the unsafe condition was either caused by one of defendant's employees or, if not caused by defendant, was known or should have been known by defendant; and (3) defendant failed to take reasonable steps to rectify the unsafe condition. Quinlivan, 395 Mich. at 259; Serinto v. Borman Food Stores, 380 Mich 637, 640-41, 158 N.W.2d 485 (1986); Whitmore v. Sears, Roebuck & Company, 89 Mich. App. 3, 8-9; 279 N.W.2d 318 (1979). Defendant still may raise the affirmative defense of an "open and obvious danger." Riddle, 440 Mich. at 95-96.

A. WATER ON THE STAIRS AS AN UNSAFE CONDITION

Defendant contends that the existence of the water on the staircase was an open and obvious danger, and under Riddle, defendant did not owe a duty to protect its invitees. However, this Court needs not address this issue because plaintiff has failed to set forth evidence that goes to whether defendant had notice of the existence of the water

on the staircase.

As stated above, plaintiff must produce evidence that the unsafe condition, namely, water on the stairs, was either cause by an employee of defendant or, if not caused by defendant, was known or should have been known by defendant. See e.g. Whitmore, 89 Mich. App. at 8-9. Defendant asserts that plaintiff has no evidence to establish this element, and thus, as a matter of law, plaintiff's claim -- that the existence of water on the staircase made the staircase unreasonably dangerous -- must fail. Defendant's argument is persuasive.

The Michigan Supreme Court, in Oppenheim v. Pitcairn, 293 Mich. 475, 292 N.W. 374 (1940), held that a plaintiff cannot meet the burden of proof on this element where a plaintiff cannot establish how long the condition existed. 293 Mich. at 478. In that case, plaintiff fell on a smooth terrazzo floor which was located in defendant's train station. On the day in question, it was raining outside and plaintiff testified that the floor was wet and slushy where she

fell. The Michigan Supreme Court held that this was insufficient to meet plaintiff's burden of proof. Id. See also Whitmore, 89 Mich. App. at 8-10 (plaintiff';s testimony that numerous cars appeared to have driven through oily substance located on defendant's parking lot was insufficient because it was mere conjecture).

In the instant case, Ms. Craig does not know how long the water had been on the stairs and assumes that it was tracked in from the outside. Further, defendant's store had just opened for business. Moreover, an employee of defendant testified in a deposition that he inspected the stairs in question anywhere from 2 to 5 minutes before the accident occurred and observed no water on the stairs. In addition, this same employee testified that he had used these stairs approximately 15 minutes before the accident and that no water was present on the stairs.

Plaintiff did not address this issue in her response brief. The following passage from Celotex is dispositive on whether summary judgment is appropriate on this issue.

> The burden on the moving party may be discharged by "showing" -- this is, pointing out to the district court -- that there is an absence of evidence to support the non-moving party's case. Once a moving party has made that showing, the burden passes to the non-moving party to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.

Celotex, 477 U.S. 317, 106 S.Ct. 2548, 2554. Plaintiff failed to even address this issue. Therefore, there is no genuine issue of material fact as to plaintiff's inability to produce evidence to show how long the water was on the stairs and who was responsible for the water being there. Thus, plaintiff fails to make out a prima facie case under Michigan law. Accordingly, defendant's motion for summary judgment with respect to the issue of whether defendant was negligent in allowing the water to be on the stairs is GRANTED.[5]

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[5] The extent that plaintiff's claim that defendant failed to warn plaintiff of a dangerous condition is implicated by water being the dangerous condition, it follows that plaintiff's failure to warn claim no longer exists, because the existence of the water, as a matter of law, was not a dangerous condition which defendant could be held liable for. Therefore, defendant, as a matter of law, did not have to provide any warnings with respect to the water which existed on the staircase.

B. DEFECTIVE DESIGN AND DUTY TO WARN

As to plaintiff's claim that the stairs were negligently designed or maintained, defendant argues that such a claim is based entirely on impermissible speculation and conjecture. Defendant attacks the prong of the test that requires plaintiff to establish that an unsafe condition existed on defendant's premises. The crux of defendant's argument is that plaintiff's expert witness does not say and does not qualify to opine that plaintiff's fall was due to anything else besides the water being on the stairs.

The issue of whether plaintiff's expert is qualified to be an expert witness under the Federal Rules of Evidence is not before the Court at this time. Viewing the facts in the light most favorable to plaintiff, the non-moving party, as this Court is required to do, it will be assumed for the purposes of this motion that plaintiff's expert will qualify as an expert witness under the Federal Rules of Evidence. Plaintiff's expert, in his deposition, has offered sufficient evidence that goes to how the staircase in issue was negligently designed. Since a

reasonable jury could find for plaintiff on the issue of negligent design, summary judgment on this issue is inappropriate. See Anderson, 106 S.Ct. at 2511. Therefore, defendant's motion for summary judgment as it relates to the design of the staircase in issue is DENIED.

III. CONCLUSION

This Court, after a careful review of the briefs, the depositions, and the case file, hereby ORDERS that defendant's motion for summary judgment be GRANTED as to the issue of defendant's liability based on the existence of water on the staircase. However, it is further ORDERED that defendant's motion for summary judgment be DENIED as to the issue of negligent design of the staircase.

IT IS SO ORDERED.

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REBECCA BAKER, A legally Incapacitated Person, by WILLIAM J. BAKER, Jr., Guardian, and WILLIAM J. BAKER, SR.

Plaintiffs,

v.

CASE NO. 91-CV-75687-DT
HON. LAWRENCE P. ZATKOFF

SEARS, ROEBUCK AND COMPANY,

Defendant.
_____/

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 17th day of December 1992.

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

INTRODUCTION

This matter is before the Court on defendant's motion

for summary judgment pursuant to Fed. R. Civ. P. 56(c).[1] Both plaintiff and defendant have filed their respective supplemental briefs on the issue of plaintiff's negligent design claim, and both parties filed an additional response brief.[2] Pursuant to E.D. Mich. LR 7.1(e)(2), the Court ORDERS that defendant's motion for summary judgment be disposed of upon the briefs which the parties have filed and without the Court entertaining oral arguments on this motion. For the reasons set forth below, defendant's motion for summary judgment is GRANTED.

I. BACKGROUND

In its 18 September 1992 Memorandum Opinion and Order, the Court set forth the facts of this case in great detail. September 18, 1992, Memorandum Opinion and Order at 2-

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[1] In a Memorandum Opinion and Order dated September 18, 1992, the Court granted defendant's motion for summary judgment as to the issue of its liability for water being on the stairs. In an Order dated 15 October 1992, the Court directed the parties to submit supplemental briefs addressing the issue of summary judgment on plaintiff's design defect claim.

[2] Although the Court did not order the parties to file these response briefs, the Court will consider them in its determination of this motion.

5. The Court finds no reason to repeat the facts in this Opinion.

II. OPINION

A. STANDARD OF REVIEW

Defendant brought this motion for summary judgment pursuant to Fed. R. Civ. P. 56. Under this rule, summary judgment is appropriate only where no genuine issue of material fact remains to be decided and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists when "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511 (1986) (citations omitted). In applying this standard, the Court must view all materials offered in support of a motion for summary judgment, as well as all pleadings, depositions, answers to interrogatories, and admissions properly on file in the light most favorable to the non-moving party." Id. 106 S.Ct. at 2510. However, as the Supreme Court stated in Celotex

Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986):

> the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on as essential element of her case with respect to which she has the burden of proof.

Id. 106 S.Ct. at 2252. In addition, "Rule 56(e)...requires the non-moving party to go beyond the pleadings and by her own affidavit, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. 106 S.Ct. at 2553.

The Court notes, however, that this case is one based in negligence and that:

> The purpose of the [summary judgment] rule is

> not to cut litigants off from the right to trial by jury....[A] party should not be deprived of an adequate opportunity to fully develop his case by witnesses in an trial where the issues involved make such procedure the appropriate one.... In the instant case, plaintiff seeks recovery based upon defendant's alleged negligence. This Court has previously noted that there is eminent authority in support of the proposition that issues of negligence are ordinarily not susceptible of summary adjudication, but should be resolved by trial in the ordinary manner... It is only in the exceptional negligence case that the rule should be invoked.... And even where the trial judge reasonably may surmise that plaintiff is unlikely to prevail upon a trial, that is not a sufficient basis for refusing him his day in court with respect to issues which are not shown to be sham, frivolous, or so unsubstantial that it would obviously be futile to try them.

Rogers v. Peabody Coal Co., 342 F.2d 749, 750, 751 (6th Cir. 1965) (citations omitted).

However, "it would be wrong to assume that summary judgment is never appropriate in negligence actions. A summary judgment motion in favor of defendant should be granted in those cases in which there is no genuine issue as to any fact that is crucial to plaintiff's cause of action so that as a matter of law he cannot recover." C. Wright, A. Miller, &

M. Kane, Federal Practice and Procedure: Civil 2d § 2729, at 197 (1983).

B. PLAINTIFF'S NEGLIGENT DESIGN CLAIM

Plaintiff claims that the stairs at defendant's store, on which she fell, were negligently designed. Under Michigan law, plaintiff bears the burden of proving her prima facia case of negligence at trial. See, e.g., Yearsley v. Citibank, 361 Mich. 574, 577, 106 N.W.2d 162 (1960). It is axiomatic that in order to prove that defendant was negligent plaintiff must prove the following: 1) that defendant owed a duty to plaintiff; 2) that defendant breached that duty; 3) that the breach of that duty was both the actual and the proximate cause of plaintiff's injury; and 4) plaintiff must have suffered damages. See, e.g., Schindler v. United States, 661 F.2d 552 (6th Cir. 1981).

Defendant's first argument in support of its motion for summary judgment center's around plaintiff's ability to prove that the stairs in issue were the proximate cause of plaintiff's injuries. Defendant as conceded, for the limited purpose of

this motion, that plaintiff can prove that defendant owed plaintiff a duty, that defendant breached that duty by having a negligently designed staircase at its place of business, and that plaintiff has suffered damages.

Defendant relies on the many representations made by plaintiff's counsel in briefs filed with the Court, in which plaintiff concedes that '[t]here is no way to verify what Plaintiff saw or actually slipped on as she was carefully walking down the steps." Plaintiffs' supplemental brief at 4. However, in the same supplemental brief, plaintiff states that:

> Prior to Plaintiff's memory loss, she told other family members that she actually avoided the water on the steps and slipped on a dry part of the step. Corrine Rogers, Plaintiff's sister, will testify that Ms. Baker [plaintiff] told her shortly after the incident that she avoided the water on the steps and that she slipped while stepping on a dry area of the step. Furthermore, Ms. Rogers stated that she did not slip on anything else (i.e., show lace, pant leg, etc.), besides the slippery dry step.

Plaintiffs' supplemental brief at 5.

This assertion, by plaintiff's counsel, as to what Ms. Rogers will testify to is insufficient to rebut a properly supported

motion for summary judgment. The description of what Ms. Rogers will testify to at trial was contained in an unsworn assertion by plaintiff's counsel. Ms. Rogers has not been disposed in this case. Ms. Rogers did not file an affidavit in this case regarding her testimony. Accordingly, plaintiff has failed to go beyond the pleadings and as not presented an affidavit or parts of a deposition, an answer to interrogatories, or an admission on file, which designates a specific fact showing the there is a genuine issue of material fact regarding an essential element of her claim which she bears the burden of proof on at trial, that is, the element of causation. See Fed. R. Civ. P. 56(e); Celotex, supra. Accordingly, plaintiff's counsel's assertion as to what Ms. Rogers will testify to at trial is insufficient to rebut a properly support motion for summary judgment.[3]

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[3] In addition, for the sake of completeness, the Court notes that even if the assertion had been contained in an affidavit, that the statement would not be admissible evidence at trial because the testimony is hearsay. Fed. R. Civ. P. 56(e) requires that statements in affidavits be in the form of admissible evidence. Plaintiff argues that it would be admissible under Fed. R. Evid. 804(b)(5), which provides, in relevant part:

> (b) Hearsay exceptions. --The following are not excluded by the hearsay rule if the declarant is

Plaintiff also relies on the Michigan Standard Jury Instructions in an attempt to defeat defendant's motion for summary judgment. The relevant jury instruction provides as follows: "Since Plaintiff has a loss of memory concerning the facts of this case and it was caused by the occurrence, you may infer that the Plaintiff was not negligent." Mich. SJI2d 10.09. Plaintiff's reliance on this jury instruction is misplaced. Jury instruction 10.09 was adopted in light of the Michigan Supreme Court's decision in Knickerbocker v. Samson, 364

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unavailable as a witness:

....

(5) Other exception. --A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable effort; and (C) the general purposes of these rules and the interests of justice will best by served by admission of the statement into evidence.

Plaintiff neglects to point to the circumstantial guarantees of trustworthiness in the statement and none are immediately apparent to the Court. The statement was not made during a deposition or in an adversarial setting. In addition, the statement was not sworn to. Based on this, the Court finds that the statement does not have equivalent circumstantial guarantees of trustworthiness, and thus the statement would not be admissible under Fed. R. Evid. 804(b)(5).

Mich. 439, 111 N.W.2d 113 (1961). In Knickerbocker, the court held that where the defendant has the burden of proving the plaintiff's negligence -- in light of the fact the Michigan has adopted the comparative negligence standard -- that there would be no presumption of negligence where plaintiff had no recollection of the incident. As defendant states in its brief to the Court: "Plaintiff here attempts to turn that principle inside out and use it affirmatively, arguing that where plaintiff has the burden to prove negligence by defendant and plaintiff has no recollection of the incident, there some is a presumption that the defendant was negligent." Defendant's supplemental brief at 12n.2. Such argument is not supported by the law in Michigan.

Furthermore, a proper reading of the jury instruction shows the weakness of plaintiff's argument. In relevant part the jury instruction provides that "Plaintiff has a loss of memory...and it was caused by the occurrence [defendant's negligence]...." Here, there is no evidence that defendant's allegedly defective staircase was the cause of plaintiff's fall.

Moreover, the jury instruction states that the jury "may infer that the plaintiff was not negligent." In order for the jury instruction to have the effect which plaintiff seeks to have this Court give it, the jury instruction would have to provide that the jury "may infer that the defendant was negligent." Accordingly, Mich. SJI2d 10.09 does not help plaintiff to rebut defendant's properly supported motion for summary judgment.

Consequently, the Court finds that plaintiff has failed to make a showing sufficient to establish the existence of an element essential to plaintiff's case and on which plaintiff has the burden of proof at trial, and thus summary judgment in favor of defendant is proper. See Fed. R. Civ. P. 56(c); Celotex, supra. Because the Court grants defendant's motion for summary judgment for the reasons stated immediately above, the Court does not reach the issue of whether plaintiff's expert witness qualifies under the Federal Rule of Evidence.

CONCLUSION.

For all of the aforementioned reasons, defendant's motion for summary judgement as to plaintiff's negligent design claim is hereby GRANTED.

IT IS SO ORDERED.

LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE